

GENERAL COUNSEL
OF COPYRIGHT

NOV 8 1996

RECEIVED

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20540

----- X
:
In re: Digital Phonorecord Delivery : Index No. 96-4
Rate Adjustment Proceeding : CARP DPRA
:
----- X

JOINT MOTION TO VACATE SCHEDULE FOR CARP PROCEEDING TO
SET RATES AND TERMS FOR DIGITAL PHONORECORD DELIVERIES

The Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), and The Harry Fox Agency, Inc. ("HFA") (collectively, "the Parties")^{1/} respectfully request that the Copyright Office vacate the present schedule for a CARP proceeding to determine rates and terms for digital phonorecord deliveries ("DPDs").

On July 12, 1996, the Copyright Office issued a Notice of Initiation of Negotiation Period (the "Notice") for determining the rates and terms for DPDs pursuant to 17 U.S.C. § 115(c)(3)(C). See 61 Fed. Reg. 37,213 (July 17, 1996).

^{1/} RIAA is a trade association whose member recording companies create, manufacture and distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. NMPA is the principal trade association of music publishers in the United States. NMPA's wholly-owned licensing subsidiary, HFA, represents over 16,000 publisher-principals in the issuance of mechanical recording licenses and other licensing activities. HFA issues licenses for approximately eighty percent of all musical compositions licensed for recording purposes in the United States.

That Notice established a negotiation period of July 17, 1996, through December 31, 1996 "intended to promote the private settlement of the rates and terms for [DPDs]." Id. at 37,214. It further required that, in the event negotiations are unsuccessful, interested parties must file petitions to convene a CARP by January 10, 1997, and written direct cases by January 31, 1997.

Shortly after the Copyright Office Notice was issued, the Parties commenced industry negotiations pursuant to 17 U.S.C. §§ 115(c)(3)(B) and 115(c)(3)(C) to determine rates and terms for DPDs. As a result of the negotiations conducted to date, the Parties have reached agreement in principle on the basic elements of a voluntary DPD license, and are optimistic that they will be able to negotiate the remaining terms for the activities covered by the compulsory license for DPDs. Pursuant to section 115(c)(3)(C), the Parties intend then to submit the rates and terms of their negotiated license to the Librarian of Congress.

Because procedures for industry negotiations concerning the rates and terms for the compulsory license for DPDs were only recently created by the Digital Performance Right in Sound Recordings Act of 1995 ("Digital Performance Act"), this is necessarily the first time that such negotiations have been carried out by the industry. In order to give due consideration to the novel issues raised by DPD licensing arrangements, the Parties require more time than is currently allowed under the schedule set by the Copyright Office to complete their negotiations. While the Parties expect to finalize an agreement by April 1, 1997, they believe efforts to reach a negotiated agreement will be disrupted by a schedule that calls for the commencement of adversarial proceedings in January 1997. This would be contrary

to both the purpose of the voluntary negotiation period as expressed by the Copyright Office and the intent of the Digital Performance Act as reflected in its legislative history.

Congress did not intend to force parties prematurely into adversarial proceedings with respect to DPD rates when they are negotiating in good faith to voluntarily reach an agreement. Congress' intent, as clearly articulated in the legislative history of the Digital Performance Act, was to give parties reasonable time to reach voluntary agreements and thereby avoid costly -- and unnecessary -- proceedings:

If an agreement as to rates and terms is reached and there is no controversy as to these matters, it would make no sense to subject the interested parties to the needless expense of an arbitration proceeding conducted under section 115(c)(3)(D).

141 Cong. Rec. S11,945, S11,958 (daily ed. August 8, 1995).

The Parties strongly believe that to proceed on the current schedule will undermine their efforts to negotiate a voluntary DPD license. Rather than fulfilling the legislative intent to encourage the formation of voluntary agreements, the current schedule forces the Parties to expend time and effort in preparing written direct cases and conducting discovery that would otherwise be spent in negotiations. Furthermore, it undermines the negotiations by compelling the Parties to concentrate on litigation strategy instead of negotiating the terms of an agreement.

Recognizing the rapid rate of development in digital transmission technology and the novel issues presented with respect to DPDs, Congress expressed its desire to provide parties flexibility in setting the schedule for determining the applicable rates and terms. See 141 Cong. Rec. S11,957. The only schedule that the

statute specifies with respect to the initial adjustment of the DPD rate is the period -- June 30 through December 31, 1996 -- during which the Librarian is to publish notice of the initiation of voluntary negotiations. 17 U.S.C. § 115(c)(3)(C). And even with respect to that time period, Congress expressed its desire to allow the parties flexibility in setting a schedule for the negotiations:

[T]he exact date of the notice [of the commencement of the first voluntary negotiation proceeding] is of limited importance because subparagraph (B) authorizes negotiations that can begin or end at any time, as determined by the parties.

Id. As the Copyright Office pointed out in its July 12 Notice, Congress did not specify a deadline or duration for the completion of the negotiation period. 61 Fed. Reg. 37,214. Nor did it establish a deadline by which an arbitration proceeding to adjust the DPD rate had to commence or conclude. Instead, Congress provided that regardless of the date a new DPD rate is determined, it will be effective as of January 1, 1998. 17 U.S.C. § 115(c)(3)(A)(ii).

The schedule announced in the Notice appears to be predicated in part on the Copyright Office's concern that a CARP proceeding be completed by January 1, 1998, when the new DPD rates and terms are set to take effect. The Notice states that the schedule was designed to avoid "a lapse in time when no rates apply to [DPDs]." 61 Fed. Reg. 37,214. However, because the Copyright Act expressly provides for the retroactive application of any new DPD rates and terms, there will in fact be no such lapse. By operation of law, the new DPD rates and terms will become effective as of January 1, 1998, regardless of the date they are determined. The Parties therefore submit that no party will be prejudiced by virtue of vacating the

schedule set by the Copyright Office in order to allow the Parties sufficient time to complete the current negotiations.

The Copyright Office Notice also solicited comments on the advisability of consolidating the proceeding to set the mechanical royalty rate for physical phonorecords with the DPD rate adjustment proceeding. The Parties believe it would be inappropriate to consolidate the two proceedings at this time. As discussed above, the Parties are conducting negotiations regarding the DPD rates and terms and are reasonably confident that they will finalize an agreement by April 1, 1997. In the unlikely event that agreement is not reached regarding DPD rates and terms by April 1, 1997, the parties will notify the Copyright Office as to their views concerning consolidation at that time.

Accordingly, the Parties request that the Copyright Office vacate the schedule set in its July 12 Notice. The Parties expect to submit a final voluntary license to the Librarian by April 1, 1997 and to request that the Librarian notify interested parties of that agreement in a notice-and-comment proceeding as provided under the current CARP regulations. See 37 C.F.R. § 251.63(b); see also 141 Cong. Rec. S11,958. In the event they are unable to reach agreement within that time period, the Parties will notify the Copyright Office by April 1, 1997, to indicate whether the parties need additional time for negotiation.

November 8, 1996

Respectfully submitted,




Cary H. Sherman
Steven R. Englund
Steven M. Marks
ARNOLD & PORTER
555 Twelfth Street
Washington, D.C. 20004
(202) 942-5000

Counsel for Recording Industry
Association of America

Of Counsel:

David E. Leibowitz, Esq.
Linda R. Bocchi, Esq.
Recording Industry Association
of America
1020 Nineteenth Street, N.W.
Suite 200
Washington, D.C. 20036



Carey R. Ramos
Peter L. Felcher
PAUL WEISS RIFKIND WHARTON &
GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel for National Music Publishers'
Association, Inc. and The Harry Fox
Agency, Inc.

Of Counsel:

Charles J. Sanders, Esq.
National Music Publishers' Association, Inc.
and The Harry Fox Agency, Inc.
711 Third Avenue
New York, New York 10017